IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, et al., *Petitioners,*

v.

JUANITA KREPS, Secretary of Commerce of the United States of America, et al., *Respondents.*

BRIEF OF AMICI CURIAE MEXICAN AMERICAN/HISPANIC CONTRACTORS AND TRUCKERS ASSOCIATION, INC., LEAGUE OF UNITED LATIN AMERICAN CITIZENS, AMERICAN G.I. FORUM, INCORPORATED MEXICAN AMERICAN GOVERNMENT EMPLOYEES

VILMA S. MARTINEZ
MORRIS J. BALLER
JOEL G. CONTRERAS
NICASIO DIMAS, JR.
Mexican American Legal Defense and Educational Fund
28 Geary Street - 6th Floor
San Francisco, CA 94108

Attorneys for Amici Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

SUBJECT INDEX

AUTHORITIES CITED

AUTHORITIES CITED--Cont.

AUTHORITIES CITED--Cont.

CONSENT OF PARTIES

The letters of Petitioners and Respondents consenting to the filing of this brief amicus curiae have been filed with the Clerk of the Court pursuant to Rule 42 (2), Rules of the Supreme Court of the United States. Amici file this brief on the merits in support of the position of the Respondents to this action.

INTEREST OF AMICI CURIAE

The Mexican American/Hispanic Contractors and Truckers Association, Inc., is a non-profit organization located near San Francisco, California. It is a successor to the former Mission Contractors Association. The membership is composed of over forty Mexican American and other Hispanic firms which seek to provide various technical, administrative, and affirmative action information services to its members and other Hispanic firms in Northern California. Members of the Association have been awarded contracts under the minority set-aside provision for local public works projects under review in this case.

The League of United Latin American Citizens (LULAC) is a national civil rights organization with social, economic,

and cultural functions. Its 50th anniversary year, 1979, continues the development of an equitable share of economic and employment opportunities for Hispanics. LULAC has been responsible for the formation of Operation SER, the largest Hispanic training program in the country.

The Incorporated Mexican American Government Employees (IMAGE) is a national organization concerned with the public employment of Hispanic Americans, Mexican Americans, Cuban Americans, Puerto Ricans, Central-South Americans, and all those of Hispanic cultural/linguistic heritage. With close to 70 affiliates chartered in 24 states, IMAGE is incorporated in the District of Columbia. IMAGE was created because of the substantial underrepresentation of Hispanics in federal, state

and local employment, including governmental contracting. For example, although Hispanic Americans comprise over 7% of the national population, they hold 3.5% of the 2.4 million federal jobs, 2.4% of the 1.5 million state jobs, and 4.1% of the 2.5 million local/municipal jobs.

The American G. I. Forum is a veteran's family organization composed primarily of Mexican Americans. It had its beginnings after World War II in the aspirations of returning Mexican American veterans to end the discriminatory social, economic and political discrimination against Mexican Americans. One of the main goals of the Forum is the improvement of employment and economic opportunities for Mexican Americans.

QUESTIONS PRESENTED

1. Whether the provision of the Public Works Employment Act of 1977 which sets aside ten percent of those federal funds for minority business enterprises is constitutional.

2. Whether the provision of the Public Works Employment Act of 1977 which sets aside ten percent of those federal funds for minority business enterprises is in violation of Title VI.

STATEMENT OF THE CASE

Amici defer to the parties to describe the factual setting of this case.

SUMMARY OF ARGUMENT

There is a compelling government interest served by the classification made in the set-aside provision of the Public Works Employment Act (PWEA).

Recent congressional history, the legislative history of the amendment of the PWEA to benefit minority business enterprises, and the unmistakeable purpose of the provision itself, demonstrate that the set-aside provision was intended to remedy the effect of past discrimination.

In view of information which was known to Congress, the classification established by the set-aside provision represents a necessary means of overcoming racial discrimination. Previous efforts to deal with racial discrimination against minority businesses have proved to be inadquate, and Congress is justified in the adoption of more stringent measures to redress the perceived discrimination.

ARGUMENT

I.

THE REQUIREMENT THAT TEN PERCENT OF FEDERAL GRANTS FOR LOCAL PUBLIC WORKS PROJECTS BE SET ASIDE FOR MINORITY BUSINESS ENTERPRISES IS A CONSTITUTIONALLY PERMITTED REMEDY FOR DISCRIMINATION.

There is no dispute that statutory and constitutional provisions protect all races from racial discrimination. McDonald v. Santa Fe Trail Tranp. Co., 427 U.S. 273 (1976). However, where minorities have been victims of discrimination, this court has recognized that racial classifications are permissible to provide redress. Franks v. Bowman Transp. Co., 424 U. S. 424 U.S. 747 (1976), Regents of the University of California v. Bakke, 438 U.S. 265 (1978), United Jewish Organizations v. Carey 430 U.S. 144 (1977).

And even though efforts to redress

discrimination involve the setting of numerical goals, such efforts are permissible in certain circumstances. United Steelworkers v. Weber, 47 U.S.L.W. 4851 (1979).

While courts are obliged to review racial classifications under the standard of "strict scrutiny," Loving v. Virgina, 388 U.S. 1 (1967), Dunn v. Blumstein, 405 U.S. 330 (1972), Korematsu v. United States, 323 U.S. 214 (1944) the validity of a statute using such classifications will be upheld if there is a compelling governmental interest advanced by that classification, Regents of the University of California v. Bakke, supra, and if it is tailored to meet its legitimate objectives. Dunn v. Blumstein, 405 U.S. 330 (1972).

A.

A COMPELLING STATE INTEREST IS SERVED BY THE SET ASIDE REQUIREMENTS

Petitioners claim that the legislative history is not clear as to the intent of Congress in accepting the amendment. However, where the legislative history is ambiguous, the statute itself may be examined to find the legislative intent. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, on remand 335 F. Supp. 873, supplemented 357 F. Supp. 846, reversed 494 F.2d 1212, cert. denied, 421 U.S. 991 (1971). An examination of the statute itself led the Court of Appeals to the conclusion that the purpose of the statute was "self-evident" and it was "beyond dispute" that it was intended to remedy past discrimination. Kreps, supra, at 604.

Like the plan in Weber, supra, the Set-Aside provision is "designed to break down old patterns of racial balance." Weber, at 4855. On its face, the provision rebuts any inference that it is designed to maintain a racial balance. Indeed, were this provision designed to maintain a racial balance, the percentage set-aside would have to be much higher, to reflect the proportion of the named minorities in the population, and would probably be adjusted regionally according to the number of minorities present.

That congressional intent was to "break down old patterns" which entrenched or resulted in discrimination is made clear by recent congressional history, which has included numerous anti-discrimination laws, many of which were noted by the Court of Appeals, and by the

legislative history of the set-aside provisions. Congress is empowered to take affirmative steps to prevent the use of public funds in any fashion which entrenches racial discrimination, Lau v. Nichols, 414 U.S. 563 (1974) and has taken such steps in the legislation now being challenged.

"It is, perhaps, axiomatic that the main thrust of federal statutes which were enacted to deal with various forms of discrimination on account of race, color, national origin, sex and religion, was toward rectifying the continuing effect of discrimination practiced against historically disadvantaged minorities." Sex Discrimination in Employment, 26 ALR Fed. 13, p.28. Certainly, the Civil Rights Act of 1964, was directed towards the elimination of discrimination

In Weber, this court held that the Legislative history plainly showed that Title VII was enacted because of the economic plight of Blacks.

> "It was clear to Congress that the crux of the problem [was] to open employment opportunities for Negroes in occupations which have traditionally been closed to them. (Citation omitted), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed." Weber, at 4854.

Congressional findings of discrimination against minorities have also resulted in legislation such as the Small Business Act, which evidences a Congressional determination that full participation in the business sector by all groups, including those who have been socially or economically disadvantaged, is essential. However, Congress, in the 8(a)

program of the Small Business Act, 15 U.S.C. §637(a), specifically found that "...many persons are socially or economically disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances". (emphasis added). H.R. Rep. No. 95-1714, 95th Cong., 2nd Sess. (1958).

The Court below properly considered congressional history over the past decade and a half to be relevant in determining the intent of Congress in enacting the set-aside provision, and concluded that "any purpose Congress might have had other than to mredy the effects of past discrimination is difficult to imagine" Fullilove v. Kreps, 584 F.2d 600, (2d Cir., 1978), at 605.

The Circuit Court below took note of the argument that "where an objective

can confidently be inferred from the provisions of the statute itself, recourse to internal legislative history and other ancillary materials is unnecessary. A fortiori, where an objective does not need to be inferred, but instead has been made unmistakeably clear by a series of legislative enactments which manifest a common aim, it is unnecessary to search for or require an explicit statement of purpose in each individual piece of legislation which furthers that objective.

Although the set-aside provision was not originally included in the Public Works Employment Act, but was introduced on the floor as an amendment, any characterization of this amendment as an afterthought designed strictly to give minorities a share of federal contracts is appropriate. If the amendment

involves an element of afterthought, it is that of the Congress as a whole, which had failed to take adequate measures against the contribution by the federal government to the entrenchment of discrimination in the construction industry, but upon having that called to its attention, included that provision to effectuate the legislative purpose.

The Court of appeals was also correct in considering the remarks of the amendment's sponsor, and not conveniently disposing of them as "mere debate rhetoric," as did the Court in Associated General Contractors of California v. Secretary of Commerce, 441 F. Supp. 955 (C.D. Cal. 1977), vacated and remanded, 438 U.S. 909 on remand 459 F. Supp. 766 (C.D. Cal. 1978) appeal docket sub. nom. Armistead v. Associated General Contractors of Cali-

fornia, 47 U.S.L.W. 3563 (Jan.15,1979).

The remarks of Representative Mitchell clearly show that the amendment was intended to supplement other congressional efforts to overcome the handicap faced by minority business enterprises.

> "The average percentage of minority contracts, of all government contracts, in any given fiscal year, is one percent-1 percent. That is all we give them. On the other hand we approve a budget for OMBE, we approve a budget for the SBA and we approve other budgets, to run those minority enterprises, to make them become viable entitities in our system but then on the other hand we say no, they are cut off from contracts."

Representative Mitchell saw his amendment as "an excellent opportunity to begin to remedy" the shortcomings of those prior congressional acts. 123 Cong. Rec.H.1437 (daily ed.Feb.24,1977), re-

printed in Associated General Contractors v. Secretary of Commerce, 441 F. Supp. 955, 997-1006 (C.D.Cal, 1977)

Inasmuch as the remarks were made by the person responsible for drafting the amendment, a great deal of weight must be given to that person's understanding of the intent of the provision. Brennan v. Corning Glass Works 480 F.2d 1254 (3rd Cir., 1973), reversed 94 S.Ct. 2223, 417 U.S. 188.

Representative Conyers, in his remarks, supports the conclusions that the amendment was remedial in nature, as he pointed out that

> "minority enterprises usually lose out...," and that "many other Members [of Congress] have had the same dismaying experience of trying to give solace to small businessmen who through no fault of their own simply have not been able to get their foot in the door." (emphasis added)

And it is not only the remarks of the amendment's sponsor and Representative Conyers that demonstrate congressional intent. Congressman Biaggi's remarks illustrate that the amendment was not intended to create arbitrary preferences, but to prevent continuation of discrimination inequities.

> "The objectives of this legislation [the Public Works Act] are both necessary and admirable. Yet without adoption of this amendment, this legislation may be potentially inquitable to minority businesses and workers."(emphasis added)

These remarks demonstrate an intent to effectuate congressional policy, as stated in the Sectional Analysis of Title VI, that discrimination "shall not occur" in connection with programs receiving Federal financial assistance. Sectional Analysis of Title VI, 1964 U.S. Code

Cong. & Admin. News, p.2400. It is submitted that in order to ensure that discrimination "does not occur", more than its prohibition is required. Provisions such as the ten percent set-aside, designed to eradicate existing and continuing discrimination, are necessary to ensure that it "does not occur" with the aid of federal funds. To do less than this would be to allow public funds to be spent in a "fashion which...results in racial discrimination". Lau v. Nichols, 414 U.S. 563 (1974) The clear objective of the set-aside provision, i.e., to prevent the discriminatory exclusion of minorities from government contracts, allows no conclusion other than that Congress sought to keep public funds from being used to contribute to racial discrimination, not to establish racial

eligibility for those funds.

In United Jewish Organization v. Carey, 430 U.S. 144 (1977) this Court found constitutional stringent congressional measures that permitted the use of racial criteria to eliminate the possibility of discrimination, after Congress became "dissatisfied" with its earlier, less stringent approach. The legislative history of the set-aside provision can be read as a determination by Congress that results of prior efforts, such as the SBA 8(a) program, were deficient, having resulted in only 1% of federal contracts going to minorities, and that stronger measures were called for to uproot discrimination which was firmly entrenched.

Quoting part of the House Report accompanying the Civil Rights Act of 1964 for the proposition that Congress did not

intend to prohibit affirmative action efforts, the Court in Weber necessarily included a portion of the report stating that Congress viewed "national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems" as being a catalyst for voluntary efforts by others. The set-aside provision, in furtherance of the Federal role which Congress envisioned, represents one attepmt to exercise "national leadership" toward the elimination of discrimination.

In Albemarle Paper Co., v. Moody, 422 U.S. 405 (1975), this court called upon employers to evaluate their practices and "to endeavor to eliminate" vestiges of discrimination. It is apparent that, with the set-aside provision of the Public Works Act, Congress has also

evaluated its own practices and is attempting to eliminate federal complicity in discrimination against minorities. The compelling governmental interest is so doing is self-evident.

B.
THE SET ASIDE PROVISION OF THE PUBLIC WORKS ACT IS PROPERLY TAILORED TO SERVE A LEGITIMATE OBJECTIVE

Where a compelling government interest in a racial classification is present because of the necessity of providing a remedy for past or present discrimination, the remedy designed is properly tailored when it is a necessary means of overcoming that discrimination. Dunn v. Blumstein, 405 U. S. 330, at 342 (1972).

Lesser measures, although they may be facially neutral, but that constitute ineffective remedies for the discrimination would not be properly tailored to meet the problem that Congress was addressing. The Constitution does not require that the government choose an inadequate means to achieve its aims, Storer v. Brown, 415 U.S. 724 (1974), nor is there any sound reason why Congress may not choose

multiple means to address a problem of tremendous proportions.

From the start the prospective minority businessmen faces disadvantages. With few exceptions, the route to entrepeneurship as a general or specialty contractor begins with entry into a skilled occupation. However, the historical exclusion of minority workers from skilled occupations has impeded the development of a skilled labor force in proportion to the minority population and consequently has also impeded the development of entrepeneurial ventures by minority group members. A Survey of Minority Construction Contractors, U. S. Dep't. of Housing & Urban Development (1970).

The study of minority memberships in the building trade locals is particularly pertinent to this case because of the

clear pattern of historical exclusion it represents, Herbert Hammerman, Minority Workers in Construction Referral Unions, MONTHLY LABOR REV. May 1972, at 21; cited at U. S. Commission on Civil Rights, The Challenge Ahead: Equal Opportunities in Referral Unions (1976). Based on data from all individual building trade locals that reported to the EEOC in 1969, the report noted that persons of Spanish origin constituted less than one percent of membership of 77 percent of all reporting locals in the mechanical trades (boilerworkers, electrical workers, elevator constructors, iron workers, plumbers and pipefitters, and sheetmetal workers). In fact, 58 percent of all locals reporting had no members of Spanish origin with another 19 percent reporting less than 1 percent of membership as

Spanish origin. This pattern was lower than Spanish origin membership in the laborers', roofers', brick laborers' and plasterers' unions.

The summary of the report data indicates the Congress was well informed of the plight of minority workers in the building trade unions as reported in U. S. Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions (1976).

The majority of small businesses, according to a 1972 survey, are one person operations that account for a small percentage of the gross receipts. U. S. Dep't. of Commerce, Social and Economic Statistics Administration, Bureau of the Census, 1972 Survey of Minority Owned Business Enterprises, April 1975.

This contrasts starkly with the findings reported by the EEOC in Houston, Texas — "The employment data led the Commission to conclude that the minority workers' share of company employment declines as the size of the company's work force rises." Equal Employment Opportunity Commission, An Equal Opportunity Report: Hearings on Causes of Unequal Opportunity (1970).

In 1972, the three-fourths of the firms that had no paid employees had only slightly more than one-fourth of the gross receipts by Hispanic owned businesses. The bulk of the receipts, nearly three-fourths, were made by the one-fourth of all the firms owned by Spanish origin businessmen with paid employees. On the average, the one-fourth of Hispanic businesses which have paid employees

hired only six people, indicating operations only slightly more sophisticated than those with no paid employees. As the Minority Construction Contractors Survey stated, these businesses have remained "small and marginal."

As bleak as these facts are, they are improved in part by the inclusion of Hispanics of Cuban origin in the statistics.

> The Cuban immigration, unlike that of Mexicans or Puerto Ricans, was politically, rather than economically, motivated. Although a small Cuban community had long been established in Southern Florida, by far the largest flow of immigrants came about as a result of the 1959 revolution.
>
> For the most part, the Cuban refugee was a middleclass white-collar worker or a skilled or semiskilled blue-collar

> worker-person who most likely had been economically successful prior to immigration. Newman, Profile of Hispanic Workers, in U. S. Work Force, 101 Monthly Labor Rev. 3 (Dec. 1978).

Since the Cubans had the exposure, afforded to them in their country, to skills needed by the entrepeneur, their businesses did substantially better than the average Hispanic-owned business. The average receipt per firm in 1972 for Minority business of Spanish origin was 144,000 dollars. In the state of Florida, with the Cuban population constituting more than 60% of the total Hispanic population, the average gross receipts per firm were $241,000. The Cuban-owned small business fared even better, with gross receipts of $337,000 or 134% higher than the average of $144,000. Minority

owned business of Spanish origin hired an average of six employees, but Cubans hired on the average ten employees, four more than the average. 1972 Survey of Minority-Owned Business Enterprises, supra. The greater success of Cubans in business, however, also correlates with a lower unemployment rate. According to the December, 1978 issue of the Monthly Labor Review, the Cuban unemployment rate of 8.8% was significantly lower than the 13.6% rate for Puerto Ricans, 10.1% for Mexican Americans, and 13.9% for Blacks.

According to the Minority Construction Contractors Survey, supra, most minority-owned contracting firms are small operations, caught up in a cycle of problems that confine them to small jobs, usually subcontracts; they are limited in their ability to obtain information, financing, training, personnel or management assistance, or to secure jobs on a competitive basis.

The Survey states that:

> 'Minority firms generally lack experience. Without the opportunity and administrative expertise on large jobs, minority contractors typically remain small and marginal.'
>
> '. . .minority contractors generally seem to suffer not only from racial discrimination but lack of money, contracts and management capabilities - the prerequisites for success in any business.' (emphasis added)
>
> '. . .access to financing was a primary obstacle to minority contractors operations." A Survey of Minority Construction Contractors: Published by the Office of the Assistance Secretary for Equal Opportunity. U.S. Department of Housing and Urban Development.'

It cannot be seriously disputed that past discrimination against minorities

has denied them access to the skilled professions, and this lack of access to professional training has seriously hampered them in the establishment of successful contruction firms. The most recent data available to Amici indicates that despite the governmental, private, employer, and labor efforts, the Hispanic construction contractors remain small and underdeveloped. For example, of the 100 largest Hispanic firms in terms of 1978 Gross Sales, the largest construction firm (Ranked 34) did only 7.5 million dollars worth of sales and employed only 150 employees. Nuestro's First Annual List of the Largest Companies Owned by Latinos and Based in the United States - Ranked According to 1978 Sales, Nuestro, January, 1979.

The Report on Minorities and Women

as Government Contractors, supra, concluded that the attitudes of federal contracting specialists was a crucial factor in the award of contracts; it pointed out at p. 20:

> Considerably less restraint was exercised in comments on minority firms. The nature and intensity of remarks by several contracting specialists against minority firms, generally, and socioeconomic programs left little doubt that their attitudes toward female-owned firms might be similarly biased. Statements made by several contracting officers indicate that they may not exercise their discretion in favor of minority businesses in evaluating the capabilities of prospective contractors. Since contracting officers have a great deal of latitude in the evaluation of bids submitted by construction firms, as well as in the preaward surveys of manufacturing firms, nonprofessional organizations, and service organizations, their baises may surface at this point.

Thus, Congress had substantial experience with prior programs and efforts to conclude that in the area of federal contracting the institutional biases and prejudices were a major impediment to minority contractors. Consequently, a program designed to overcome such problems should be viewed as a necessary means of overcoming that discrimination.

Such facts notwithstanding, Petitioners regard a prohibition on discrimination as sufficient, forgetting the experiences that minorities have had whenever action to back up the prohibitions was not forthcoming. Brown v. Board of Education, 349 U.S. 294 (1955), calling for an end to segregation "with all deliberate speed" remained for many years a skeletal victory which had to await the failure of voluntary compliance efforts,

for which many years were allowed, before government was willing to move affirmatively to begin integration. With the set-aside provision, Congress has made an affirmative move to eliminate discrimination in the construction industry, and has tailored the relief as precisely as the discrimination which precipitated its necessity.

In Pettway v. American Cast Iron Pipe Company, 494 F. 2d 211 (5th Cir. 1974) the court was faced with the task of calculating a classwide back pay award. The court acknowledged the "impossibility of calculating the precise amount of back pay" for each class member, since the process of determining the employment progression involved a "quagmire of hypothetical judgments." However, the Court nevertheless held that, in spite

of the problems and possible inequities, back pay would be awarded, as in fashioning a remedy, "unrealistic exactitude is not required."

Similarly, in the instant case, while Congress' means of remedying past discrimination in federally funded programs involves possible inequitities or windfalls, a more precise classification is not possible. Congress did, however, use what exactitude can be realistically expected and that is all that can be required.

Although the issue of determining who qualifies as a member of one of the enumerated groups may not be capable of an absolutely precise definition,the staute makes no attempt to precisely apportion benefits according to percentage of population. It attempts only to afford a measure of relief to groups who have been

victimized by discrimination.

The use of only facially neutral assistance criteria in the face of non-neutral disadvantages would serve only to perpetuate and entrench existing discrimination. To simply announce a ban on discrimination and calling for unspecified efforts to correct its effects is inadequate. It is well within Congressional authority to monitor and measure the effects of such prohibitions and to require stronger corrective measures upon the demonstrated failure of weaker ones. By the enactment of the set-aside provision, Congress was requiring stronger measures where lesser pressure had proved insufficient, in an effort to dismantle the existing systems which had the effect of perpetuating discrimination. Although these greater

measures take the form of a numerical percentage of federal funds, "numerical objectives may be the only feasible mechanism for defining with any clarity the obligation of federal contractors to move employment practices in the direction of true neutrality." Southern Illinois Builders Assn. v. Ogilvie, 471 F. 2d 680 (7th Cir. 1972) at 686.

The 8(a) program, 15 U.S.C. 637(a), of the Small Business Act represents a Congressional effort to assure that disadvantaged small businesses, primarily minority, were awarded a reasonable amount of contracts by federal agencies.

The contracts awarded through the 8(a) program increased from 8 contracts valued at nearly $10.5 million in FY 1968 to 1,720 contracts amount to more than $153 million in FY 1972 ($215.6 million

in FY 1973 and $271.1 million in FY 1974). The 8(a) contracts thus account for a major portion of all federal contracts awarded to minority firms. Yet they represented only a minute fraction, about .27 percent of the total federal procurement of $57.5 billion in FY 1972. *

The analysis of the 8(a) program concluded there was a specific lack of progress in construction contracting:

> A detailed analysis of 8(a) contracts awarded by GSA provides a case study of the characteristics of the program's contracting. (See Appendix C). It shows that, despite several large manufacturing contracts, most 8(a) contracts were low in value and awarded in the less promising services and small construction industries.

---

* United States Commission on Civil Rights, Minorities and Women as Government Contractors, May 1975.

> The failure of the program thus far to emphasize manufacturing and general construction contracting undermines its potential for assisting in the development of minority firms in these industrial areas. (Emphasis added). *

The minority subcontracting program, 41 C.F.R. 1-1.1310-1, is based on a requirement that certain federal contracts include clauses directing federal prime contractors to attempt to utilize minority subcontractors. The purpose is to implement the announced federal policy of creating opportunities for the participation of minority firms in government procurement. This aspect of the program attempts to utilize "best efforts" for contracts under $500,000 and "substantial contracting opportunities" when over

---

* Id. at p. 44.

that amount.

Nine of the ten federal agencies surveyed by the Commission reported they had not established systems to collect relevant and reliable information on minority subcontracting. Furthermore, statistics were not available to indicate the impact of the program, but the Commission concluded the program failed to substantially increase either the numbers of dollar amounts of subcontracts awarded to minority firms. Minorities and Women as Government Contractors, supra at 79.

The impact of the limitations and difficulties inherent in obtaining voluntary compliance with "best efforts" and "substantial compliance" in minority contracting efforts fully justified the conclusion of Congress that alternative methods were required if the problem was

going to be overcome.

Past experience with statutory set-aside programs established a proper basis for Congress to conclude that minority firms were unable to compete effectively with small but well-established white male firms that can frequently afford to underbid a new minority or female firm. * Minorities and Women as Government Contractors, supra, at 29, 102-104. Thus the minority contractor designation under the set-aside in this case was based on the failure of the past programs to reach

---

* Small Business Set-Aside, 41 C.F.R. Sec. 1-1.702 (b); Labor Surplus Set-Aside Contract, 29 C.F.R., Sec. 8; Additional information was available from State and Local Set-Asides under Illinois Small Business Purchasing Act, Illinois Revised Statutes, Ch. 122, Sec. 132.21; and Denver City Charter, Sec. 161.3 as amended by Ordinance 319, adopted July 23, 1970.

minority contractors under programs that had no specific minority set-aside provisions.

In a study done for the Colorado Civil Rights Commission under the auspices of the U. S. Equal Employment Opportunity Commission, the conclusion was reached that despite Executive Orders since 1941 prohibiting discrimination in firms that serve as government contractors, these firms in 1966 had employment records no better than other employers:

> "Following such a long period of governmental efforts, it would be a reasonable expectation to find that employers who were subject to the Office of Federal Contract Compliance in 1966 should be distinguished readily by the improved work opportunities minority workers have with them as contrasted with other employers. Unfortunately, this is not the case.

> 'Not in a single instance have minorities gained a higher percentage of the white-collar jobs with prime contractors than with employers who have no government contracts.' Schmidt, Spanish Surnamed American Employment in the Southwest, at 35.

It would indeed be tragic if constitutional and statutory provisions designed to end discrimination were interpreted as prohibiting steps to eliminate that discrimination. Petitioners' argument that there is a less restrictive way than numerical formulas or racial classifications to address the problem of discrimination against the minority entrepeneur is to argue that Congress should be limited to approaches which were demonstrated to be ineffective.

An inescapable fact is that because the discrimination prohibited by the

Constitution is based on racial classifications, "corrective action under it must do the same." United Jewish Organizations of Williamsburg v. Wilson, 510 F. 2d 512 (2nd Cir. 1975). Congress clearly determined, in these circumstances, that the classification used was necessary to effectuate the purpose of the legislation.

II.
THE SET ASIDE PROVISION OF THE PUBLIC WORKS ACT DOES NOT VIOLATE TITLE VI

A majority of the Court in Bakke found that the Title VI anti-discrimination provisions prohibited only those racial classifications that violate the Constitution. 438 U.S. at 287, 328.

It therefore follows that since the set-aside provision is constitutional, that provision does not constitute a violation of Title VI. Fullilove v. Kreps, 584 F. 2d 600 (2nd Cir. 1978).

Moreover, since Title VI is a remedial statute, it must be read in a manner which effectuates rather than frustrates the major purpose of the law. Equal Employment Opportunity Commission v. Louisville & Nashville Railroad Company, 505 F. 2d 610 (5th Cir. 1974); Tcherepin v. Knight, 389 U.S. 332 (1967).

It would certainly frustrate the major purpose of Title VI to hold that it does not permit steps to eliminate racial discrimination.

It is apparent that there is an increasing use of affirmative action programs on the legislative, judicial, and administrative levels. It has been recognized that evolving Congressional patterns may point out the intent of earlier statutes, City of Burlington v. Turner, 336 F. Supp. 594 (D.C. Iowa, 1972), and in this case the patterns point to the intent of Title VI as not prohibiting racial classifications to remedy past discrimination.

It has been the ruling of this Court that administrative interpretations of a statute by the enforcing agency is entitled to "great deference." Griggs v.

Duke Power Co., 401 U. S. 424 (1971). The congressional view that the set-aside provision was compatible with Title VI, as is demonstrated by the enactment of the set-aside long after Title VI became a strong factor in many programs, is entitled to similar deference.

CONCLUSION

Information available and known to Congress, and the actions of Congress based on that information, provide a sufficient basis to support both the necessity for and the reasonableness of the ten percent set-aside.

The judgment of the Court below should in all respects be affirmed.

Respectfully submitted,

VILMA S. MARTINEZ
President and General
Counsel

MORRIS J. BALLER
JOEL CONTRERAS
NICASIO DIMAS, JR.

Joel Contreras
JOEL CONTRERAS

Mexican American Legal
Defense and Educational
Fund
28 Geary Street
San Francisco,
California 94108

Attorneys for Amicus Curiae

October 8, 1979